181

(3)

No. 10-848

In the
# Supreme Court of the United States

EDMUND G. BROWN, JR.,
Governor of California, *et al.*,
*Petitioners*,

v.

JERRY VALDIVIA, *et al.*,
*Respondents*.

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the Ninth Circuit*

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Ninth Circuit err when it construed the *Valdivia* Stipulated Injunction's standards governing California parole revocation hearings to require balancing the parolee's right to confrontation under the Fourteenth Amendment against the State's good cause for denying it?

## LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

Edmund G. Brown, in his official capacity as Governor of the State of California, and the officials in charge of the California Department of Corrections and Rehabilitation.

Plaintiff class of California parolees who are (1) at large, (2) in custody as alleged parole violators, and awaiting revocation of state parole, and (3) who are in custody, having been found in violation of parole and sentenced to prison custody.

## TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

CONSTITUTIONAL PROVISION INVOLVED .. 1

STATEMENT OF THE CASE ..... 1

A. Introduction ..... 1

B. Adjudicated Constitutional Violations and *Valdivia* Stipulated Injunction ..... 1

C. Problems in Implementing Injunction Paragraph 24, and Special Master Findings ..... 4

D. Ninth Circuit Appeals ..... 6

REASONS FOR DENYING THE PETITION .... 8

I. THIS CASE IS NOT THE PROPER VEHICLE THROUGH WHICH TO DEVELOP THE LAW ON DUE PROCESS CONFRONTATION RIGHTS. ..... 8

A. The Order Addresses Enforcement of a Remedy the State Proposed, and Which

is Currently Subject to Further Litigation Under the Ninth Circuit's Remand. . . . . 8

B. The Petition Presents Questions of Differing Confrontation Rights for "Testimonial" and "Non-testimonial" Hearsay That Were Not Litigated Below. . . . . 10

II. THERE IS NO CIRCUIT SPLIT THAT WARRANTS *CERTIORARI* REVIEW. . . . 12

III. THE NINTH CIRCUIT'S DECISION IS FAITHFUL TO *MORRISSEY* AND RAISES NO SPECTER OF PAROLEES RECEIVING MORE PROCESS THAN CRIMINAL DEFENDANTS. . . . . 20

IV. THERE IS NO JUSTICIABLE CONTROVERSY REGARDING FUTURE CRIMINAL DEFENDANTS' POTENTIAL RELIANCE ON DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO LIMIT NON-TESTIMONIAL OUT-OF-COURT STATEMENTS IN CRIMINAL TRIALS. . . . . 24

CONCLUSION . . . . . 26

APPENDIX

Appendix A: Stipulated Order for Permanent Injunctive Relief, United States District Court, Eastern District of California,

(March 9, 2004)[CR-1034] . . . . . 1b

Appendix B: First Report of the Special Master on the Status of Conditions of the Remedial Order, In the United States District Court for the Eastern District of California, (excerpt) (Sept. 14, 2006)[CR-1302] . . . . 27b

Appendix C: Second Report of the Special Master on the Status of Conditions of the Remedial Order, In the United States District Court for the Eastern District of California, (excerpt) (June 11, 2007)[CR-1335] . . . . 29b

Appendix D: Order, United States District Court, Eastern District of California, (May 6, 2008)[CR-1439] . . . . . 31b

## TABLE OF AUTHORITIES

Page

CASES

*Aetna Life Insurance Co. v. Haworth*,
300 U.S. 227 (1937) ..... 24

*Alvarez v. Smith*,
130 S. Ct. 576 (2009) ..... 25

*Ash v. Reilly*,
431 F.3d 826 (D.C. Cir. 2005) ..... 21

*Barnes v. Johnson*,
184 F.3d 451 (5th Cir. 1999) ..... 13

*Conway v. Cal. Adult Auth.*,
396 U.S. 107 (1969) ..... 25

*Crawford v. Washington*,
541 U.S. 36 (2004) ..... 21

*Curtis v. Chester*,
626 F.3d 540 (10th Cir. 2010) ..... 14, 16, 20

*Gagnon v. Scarpelli*,
411 U.S. 778 (1973) ..... 1, 3, 12, 22

*Goldberg v. Kelly*,
397 U.S. 254 (1970) ..... 23, 25

*Goss v. Lopez*,
419 U.S. 565 (1975) ..... 20

*Graham v. Connor*,
490 U.S. 386 (1989) ..... 21

*Greene v. McElroy*,
360 U.S. 474 (1959) ..... 25

*Hamdi v. Rumsfeld*,
542 U.S. 507 (2004) ..... 22

*Klehr v. A.O. Smith Corp.*,
521 U.S. 179 (1997) ..... 20

*Mathews v. Eldridge*,
424 U.S. 319 (1976) ..... 13, 22, 24

*McNeill v. Butz*,
480 F.2d 314 (4th Cir. 1973) ..... 23

*Morrissey v. Brewer*,
408 U.S. 471 (1972) ..... 1, 3, 11, 22-25

*Nike, Inc. v. Kasky*,
539 U.S. 654 (2003) ..... 10

*Odom v. United States*,
400 U.S. 23 (1970) ..... 10

*Prellwitz v. Berg*,
578 F.2d 190 (7th Cir. 1978) ..... 14

*Springfield v. Kibbe*,
480 U.S. 257 (1987) ..... 10

*Swarthout v. Cooke*,
No. 10-333, 2011 U.S. LEXIS 1067 (562 U.S. ___ (2011)) ..... 9

*The Monrosa v. Carbon Black Export, Inc.*,
359 U.S. 180 (1959) ..... 25

*United States v. Aspinall*,
389 F.3d 332 (2d Cir. 2004) ..... 20, 21

*United States v. Bell*,
785 F.2d 640 (8th Cir. 1986) ..... 14

*United States v. Chin*,
224 F.3d 121 (2d Cir. 2000) ..... 13

*United States v. Comito*,
177 F.3d 1166 (9th Cir. 1999) ..... 4, 14-17

*United States v. Frazier*,
26 F.3d 110 (11th Cir. 1994) ..... 14

*United States v. Hall*,
419 F.3d 980 (9th Cir. 2005) ..... 16

*United States v. Jones*,
299 F.3d 103 (2d Cir. 2002) ..... 14, 19

*United States v. Kelley*,
446 F.3d 688 (7th Cir. 2006) ..... 21

*United States v. Kirby*,
418 F.3d 621 (6th Cir. 2005) ..... 15, 21

*United States v. Lloyd*,
566 F.3d 341 (3d Cir. 2009) ..... 13, 14, 21

*United States v. Martin*,
382 F.3d 840 (8th Cir. 2004) ..... 13

*United States v. Martin*,
984 F.2d 308 (9th Cir. 1993) ..... 19

*United States v. McCallum*,
677 F.2d 1024 (4th Cir. 1982) ..... 14

*United States v. O'Meara*,
33 F.3d 20 (8th Cir. 1994) ..... 14

*United States v. Penn*,
721 F.2d 762 (11th Cir. 1983) ..... 14

*United States v. Ray*,
530 F.3d 666 (8th Cir. 2008) ..... 21

*United States v. Reynolds*,
49 F.3d 423 (8th Cir. 1995) ..... 14

*United States v. Rondeau*,
430 F.3d 44 (1st Cir. 2005) ..... 21

*United States v. Simmons*,
812 F.2d 561 (9th Cir. 1987) ..... 19

*United States v. Taveras*,
380 F.3d 532 (1st Cir. 2004) ..... 13

*United States v. Walker*,
117 F.3d 417 (9th Cir. 1997) ..... 19

*United States v. Waters*,
158 F.3d 933 (6th Cir. 1998) ..... 13, 15

*United States v. Williams*,
443 F.3d 35 (2d Cir. 2006) ..... 13

*United States v. Zentgraf*,
20 F.3d 906 (8th Cir. 1994) ..... 14

*Valdivia v. Davis*,
206 F. Supp. 2d 1068 (E.D. Cal. 2002) ..... 2

*Valdivia v. Schwarzenegger*,
548 F. Supp. 2d 852 (2008) ..... 11, 12, 18

*Valdivia v. Schwarzenegger*,
599 F.3d 984 (9th Cir. 2010) ..... 6, 9

*Valdivia v. Schwarzenegger*,
603 F. Supp. 2d 1275 (E.D. Cal. 2009) ..... 9

*Williams v. Johnson*,
171 F.3d 300 (5th Cir. 1999) ..... 13

**CONSTITUTION**

U.S. CONST. amend. XIV ..... 1

**RULES**

Fed. R. Crim. P. 32.1(b)(2)(C) ..... 14

## CONSTITUTIONAL PROVISION INVOLVED

> The Fourteenth Amendment to the United States Constitution as it provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Respondents dispute the State's assertion that this case presents an issue involving the right of confrontation under the Sixth Amendment.

## STATEMENT OF THE CASE

### A. Introduction

This case is not about setting nationwide standards for parole revocation; no such standards are required or appropriate under the limited and flexible due process requirements of the Fourteenth Amendment. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). Rather, this case is about the highly fact-bound circumstances regarding a remedy for proven constitutional violations in California's parole revocation system. The Ninth Circuit properly affirmed the relief ordered by the district court for the purpose of ending long-standing constitutional violations and thereby hastening an end to continued federal court supervision.

### B. Adjudicated Constitutional Violations and *Valdivia* Stipulated Injunction

In 1972 and 1973, this Court clarified the Fourteenth Amendment due process rights of parolees to an informal administrative hearing before they could be returned to prison on alleged parole violations. *See Morrisey*, 408 U.S. at 480-490; *Gagnon*

*v. Scarpelli*, 411 U.S. 778 (1973). For decades thereafter, however, the State of California continued to return parolees to prison without the minimal due process required.

The class of California parolees therefore brought this action for injunctive relief in 1994. In 2002, the district court found that the State's parole revocation hearing system violated parolees' procedural due process rights and granted partial summary judgment in favor of Plaintiffs. *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). The district court found that California's then-existing parole revocation system undermined both the public's and the parolees' interests in accurate fact-finding. *Id.*

The State responded to its loss on summary judgment by asking the district court to stay further litigation, so that it could develop a comprehensive remedial plan for parole revocation proceedings. CR[1]-759. The State asked for an order setting forth the basic features needed in a remedial plan. CR-796 at 3-4. The district court accommodated the State and issued such an order. CR-796. The district court then further accommodated the State by approving a remedial plan that differed radically from the set of requirements that the district court had set out. CR-891; CR-1044.

The State's remedy is embodied in a Stipulated Order for Permanent Injunctive Relief ("Stipulated

[1] Documents in the District Court Clerk's Record of Case No. 94-671 LKK-GGH (E.D. Cal.) are cited as "CR-XXXX," according to the Docket Entry Number in the PACER system, unless they are included in the Appendix to this Opposition or the Petition.

Injunction" or "Injunction"). The Stipulated Injunction includes a number of measures to prevent "having parole revoked because of erroneous information[.]" *Morrissey*, 408 U.S. at 484. The measure at issue in this petition for *certiorari* is the right to confront adverse witnesses.

In the two-hearing system outlined by *Morrissey*, the parolee receives a "preliminary hearing" close in time and place to the arrest, at which he may request that a "person who has given adverse information on which the parole revocation is to be based is to be made available for questioning in his presence." *Morrisey*, 408 U.S. at 487. There is one exception: "However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination." *Id.* *Morrissey* also requires a "revocation hearing," including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 487, 489; *see also Gagnon*, 411 U.S. at 781-82, 786-87 (reaffirming *Morrissey's* confrontation rule).

Here, in keeping with the *Morrissey* command of flexibility, the district court accepted the State's remedial plan that omits all witness confrontation at the preliminary hearing, and allows witnesses to be examined only at the final revocation hearing. Resp. App. 9b, ¶ 22. In addition, the district court permitted the State greater leeway to deny confrontation than *Morrissey's* preliminary hearing confrontation language would allow. While *Morrissey* would limit such denials of confrontation to cases with "informant[s]" whose safety would be at risk if their

identity were disclosed, 408 U.S. at 487, the district court here approved a much looser standard, which allows the hearing officer to balance confrontation rights against a whole range of state interests for not producing the witness, including in some cases, "mere inconvenience or expense." *See United States v. Comito,* 177 F.3d 1166, 1172 (9th Cir. 1999).

This more flexible confrontation requirement is embodied in the following paragraph of the Stipulated Injunction to which the State agreed:

> The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in *United States v. Comito,* 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law.

Resp. App. 10b.

The district court entered the Stipulated Injunction including this provision, hereinafter referred to as "Paragraph 24," although it received submissions from objectors who contended that the State's remedial plan had watered down the *Morrissey* requirements. *See, e.g.,* CR-891 at 5-6.

### C. Problems in Implementing Injunction Paragraph 24, and Special Master Findings

In 2005, the State moved for the appointment of a Special Master, contending that the appointment was necessary to assist in resolving disputes arising under the Stipulated Injunction. CR-1198. The district court

granted the State's motion, over the objections of the Plaintiff class. CR-1205, 1213.

The Special Master found continued problems with the confrontation remedy. Resp. App. 27b-30b. During negotiations over the adequacy of confrontation policies and procedures to address the ongoing confusion in application, including improving the training of relevant hearing officers, the State notified Plaintiffs that it intended to rewrite its policies based on a new legal theory that certain technical hearsay exceptions always trump confrontation rights. The parties agreed to submit the matter to the Special Master for fact-finding and a recommendation to the district court. Pet. App. 34a.

After briefing and hearing, the Special Master made nineteen factual findings, including that the State had promulgated inaccurate policies and procedures to its hearing officers, that all parties had reported deficiencies in application of confrontation rights, and that "confusion and inconsistency" in observing confrontation rights was continuing three years into implementation of the remedy. Pet. App. 34a-44a. The Special Master found that

> [c]onfusion, inconsistency, incorrect application of standards, and failure to apply the required tests have been known for a prolonged period. Yet Defendants have taken no action to identify the scope of the problem and have not taken adequate steps to address the conditions that perpetuate potential misapplications of the law.

Pet. App. 68a. The Special Master recommended a series of further remedial steps, including revision of

policies and procedures regarding confrontation, and the development by the State of a plan for training, hearing officer standards and assessment. Pet. App. 68a-73a. The Special Master, however, recommended that further relief requested by the Plaintiff class be denied. Pet. App. 73a-74a.

The district court received responses from both the State and the Plaintiffs. Pet. App. 77a. The district court reviewed the Special Master's legal conclusions and factual findings, and found that the recommendations were "well-calculated to ensure the due process protections as expressed by the Supreme Court and the Ninth Circuit are respected." Pet. App. 77a-78a. The district court ordered that the State undertake the further remedial actions recommended by the Special Master. Pet. App. 78a. The State moved for a stay, which the district court denied, in a written order, finding, among other things, that "there is significant danger that the due process protections to which the plaintiffs are entitled are not being respected by the defendants, as evidenced by the systemic deficiencies in training and the accuracy of written materials." Resp. App. 44b. The State appealed to the Ninth Circuit.

D. Ninth Circuit Appeals

In March 2010, the Ninth Circuit's decision in *Valdivia v. Schwarzenegger,* 599 F.3d 984 (9th Cir. 2010), affirmed the pertinent part of the district court's order. Pet. App. 1a-32a. The Ninth Circuit's ruling disposed of two appeals regarding the *Valdivia* Stipulated Injunction. The second appeal is also relevant here to show one of the reasons that *certiorari* is not appropriate. The second appeal, No. 09-15836,

concerned whether the district court should consider modifying the Injunction in light of a successful state ballot initiative enacting a new parole revocation statute. Showing extreme deference to the State's federalism interests, the Ninth Circuit vacated the district court's denial of the State's motion to modify the Injunction and remanded for further findings. Pet. App. 22a-25a. No party has petitioned for *certiorari* from this second appeal.

The Ninth Circuit properly reviewed whether the district court acted within its remedial authority. The district court had "found that California's parole revocation hearing system violated Plaintiffs' procedural due process rights." Pet. App. 14a n.6. The district court therefore had authority to issue orders to enforce the remedy that the State itself had agreed to. *Id.*; Pet. App. 4a. The Court of Appeals held that the district court had not abused its discretion in ruling that the State must continue to use a balancing test for hearsay statements introduced against parolees, as the State had agreed to do in the Stipulated Injunction. Pet. App. 14a-15a. The Ninth Circuit also affirmed the parts of the remedial order directing the development of new policies and procedures, trainings, and standards for assessment of hearing officers. Pet. App. 19a-20a.

## REASONS FOR DENYING THE PETITION

### I. THIS CASE IS NOT THE PROPER VEHICLE THROUGH WHICH TO DEVELOP THE LAW ON DUE PROCESS CONFRONTATION RIGHTS.

#### A. The Order Addresses Enforcement of a Remedy the State Proposed, and Which is Currently Subject to Further Litigation Under the Ninth Circuit's Remand.

The decision below is not about setting nationwide standards for parole revocation. The decision is about what remedies are necessary for California's long-standing violation of due process rights in parole revocation. The State agreed to use a *Comito* balancing test as part of that remedy. The district court found that the remedy remains necessary, and that further steps were necessary to bring the State into compliance. Even this part of the remedy, however, remains a moving target, because the Ninth Circuit has directed the district court to consider modification of the entire remedy based on a new state law regarding parole revocation. Pet. App. 22a-25a.

The Petition suggests that the "Ninth Circuit approached the issue as constitutional, not contractual." Pet. at 21. The Petition, however, fails to acknowledge that the parties set the contractual bounds of the Injunction's provision on confrontation and that following *Comito* was the approach to which the State voluntarily agreed. Resp. App. 39b. The district court's order is grounded not only in the parties' contract, but also in the district court's proper determination, based on facts found by the Special Master after a hearing, that a clarifying remedial

order was necessary to ensure that the case proceeded toward constitutional compliance, and eventual termination.

The district court and the Ninth Circuit were properly mindful of the limited role that federal due process plays in state parole revocation procedures. The ruling below concerns only procedural rights. It does not trench in any way on the substantive results of any parole hearing. It does not command that any items of evidence be admitted or excluded in parole revocation hearings. It merely enforces the minimum procedural right to have the hearing officer find good cause before denying cross-examination of an adverse witness. *Cf. Swarthout v. Cooke,* No. 10-333, 2011 U.S. LEXIS 1067, at *6 (562 U.S. ___ (2011)) (holding that federal courts may not engage in substantive review of parole consideration decisions, stating that "[w]hen, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally required procedures").

To the extent that the current litigation raises any federalism issues, those issues are not ripe for review by this Court because the Ninth Circuit, in the same order challenged here, has directed the district court to consider whether the entire remedial scheme should be modified based on a change in state law. The new state law, Proposition 9, would change the confrontation rules in parole revocations. *Valdivia v. Schwarzenegger,* 603 F. Supp. 2d 1275, 1283-84 (E.D. Cal. 2009), *vacated and remanded,* 599 F.3d 984 (9th Cir. 2010). By the time this Court could resolve this appeal, the remedial scheme will have undergone a

thorough review by the district court, including possible modification, and further review by the Ninth Circuit. If *certiorari* were granted now, it is likely that this Court would have to dismiss *certiorari* as improvidently granted based on the further litigation taking place in the district court. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring); *Odom v. United States*, 400 U.S. 23 (1970).

### B. The Petition Presents Questions of Differing Confrontation Rights for "Testimonial" and "Non-testimonial" Hearsay That Were Not Litigated Below.

This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (*per curiam*). The Petition attempts to concoct a cert-worthy question by pressing an issue that was never litigated below—whether due process confrontation rights apply to non-testimonial hearsay. This was not litigated below because the problem does not come up in the informal settings of parole revocation. California parole revocations remain informal matters, taking place around a table in small prison meeting rooms or cubicles, and presided over not by judges but by hearing officers, many of whom are not attorneys. *See* Pet. App. 38a. Hearsay statements are introduced informally, usually when a parole agent reads from his file. Rules of evidence and fine distinctions such as "testimonial" versus "non-testimonial" statements are not parsed in these informal settings. Rather, the hearing officer makes common sense decisions based on fundamental fairness, and considers "evidence including letters, affidavits, and other material that

would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489.

Moreover, the type of evidence usually at issue does not consist of business records and documents. Such material is almost always admitted under the flexible *Comito* balancing. The evidence that matters to parolees are statements by witnesses to the police or parole agent, which the parole agent tries to read to the hearing officer without the witness present. That was the situation in *Comito*, and is the historical abuse that the Injunction seeks to remedy. It does not raise questions of "testimonial" versus "non-testimonial" hearsay.[2]

Because distinctions between "testimonial" and "non-testimonial" hearsay do not arise in informal parole revocation hearings, both parties answered in the negative when the Special Master specifically asked whether the distinction mattered to the resolution of this dispute. At the hearing on Plaintiffs' motion to enforce Paragraph 24, the Special Master asked whether "[a]s we are thinking about the effect of hearsay exceptions, should we be distinguishing documents from testimonial evidence from other types of out-of-court statements?" *Valdivia v. Schwarzenegger*, 548 F. Supp. 2d 852, 987 (2008). The

[2] The hypothetical offered by the dissent in the *en banc* decision, regarding a 911 caller exclaiming "My husband Bob just shot me!" would not require application of the testimonial/non-testimonial distinction for proper resolution in an informal parole revocation hearing. Pet. App. 82a. The *Comito* balancing takes full account of indicia of reliability, such as those surrounding an excited utterance of this type. The statement would be deemed so reliable, that the State would be required to show very little or nothing in the way of good cause to excuse confrontation.

State's counsel responded in the negative. The State's counsel elaborated that there was no need to inquire into such distinctions because the parties had agreed in the Injunction to be bound by the Ninth Circuit's *Comito* balancing test, and that test recognized no distinction between testimonial and non-testimonial evidence. *Id.* at 992-93 ("*Comito* itself doesn't make a distinction between the two at all. And so tying the obligation to *Comito*, which it must be because of the injunction, there's nothing in *Comito* itself that says there should be a distinction between the two").

The Ninth Circuit opinion only mentions the distinction in order to respond to a point made by the dissent. Pet. App. 13a. As the matter was not pressed by the parties in the district court, and was not necessary for the Ninth Circuit to decide, it formed no part of the Ninth Circuit's holding.

Petitioners' new legal theory—that due process confrontation does not apply at all to "non-testimonial" statements—may be an interesting one, but it was not litigated and decided in the court below. If *certiorari* were granted, the Court would be proceeding without the benefit of a developed record below on this question.

## II. THERE IS NO CIRCUIT SPLIT THAT WARRANTS *CERTIORARI* REVIEW.

What the Petition characterizes as a "circuit split" is merely the natural result of this Court's flexible due process jurisprudence. Pet. App. at 16-19. States (and the federal supervised release system) remain free to experiment and innovate with the limits of minimal due process. *Gagnon*, 411 U.S. at 782 n.5. Indeed,

that is what California has done here, devising a system that, among other variations, omits all witnesses from the preliminary hearing. Given the inherent flexibility of federal due process, it is no surprise that the circuits must use a variety of analytical frameworks to address the specific procedures in front of them. There is no need for this Court to impose uniformity; to do so would undermine the flexibility at the core of administrative due process. The various analytic frameworks, moreover, are not in practical conflict, but simply amount to different ways of expressing the same individualized balance between the parolee's interest in cross-examining a particular witness, and the government's interest in not producing the witness.

Due process requires a balancing of the respective government and individual interests at stake. *Mathews v. Eldridge,* 424 U.S. 319, 348-49 (1976). Therefore, the First, Second, Third, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have described the confrontation inquiry as a balancing test. *See, e.g.*, *United States v. Taveras*, 380 F.3d 532, 536-37 (1st Cir. 2004); *United States v. Williams*, 443 F.3d 35, 45-46 (2d Cir. 2006) (finding government's good cause in failing to produce witness outweighed probationer's right to confront); *United States v. Chin,* 224 F.3d 121, 124 (2d Cir. 2000); *United States v. Lloyd*, 566 F.3d 341, 344-45 (3d Cir. 2009) ("[A] district court should apply a balancing test when considering the releasee's asserted right to cross examine adverse witnesses."); *Barnes v. Johnson*, 184 F.3d 451, 454 (5th Cir. 1999); *Williams v. Johnson,* 171 F.3d 300, 306 (5th Cir. 1999); *United States v. Waters*, 158 F.3d 933, 940 (6th Cir. 1998); *United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004) (district court must balance probationer's

right to confront witness against the grounds asserted by the government for not requiring confrontation); *United States v. Reynolds*, 49 F.3d 423, 426 (8th Cir. 1995); *United States v. O'Meara*, 33 F.3d 20, 21 (8th Cir. 1994); *United States v. Zentgraf*, 20 F.3d 906, 909-10 (8th Cir. 1994); *United States v. Bell*, 785 F.2d 640, 642-43 (8th Cir. 1986); *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) ("the court must balance the defendant's right to confront adverse witnesses against the grounds asserted by the government for denying confrontation . . . the hearsay must be reliable"); *United States v. Penn*, 721 F.2d 762, 764 (11th Cir. 1983).[3]

A minority of three circuits, the Second, Seventh, and Tenth, have held that where the proffering hearsay falls within a firmly rooted exception, there is no need to consider the government's reasons for not producing the witness. *See United States v. Jones*, 299 F.3d 103, 113 (2d Cir. 2002); *Prellwitz v. Berg*, 578 F.2d 190, 192 (7th Cir. 1978); *Curtis v. Chester*, 626 F.3d 540, 545-46 (10th Cir. 2010). In addition, the Third Circuit did not hold but noted in *dicta* that a showing of cause may not be necessary where the hearsay's reliability is overwhelming. *Lloyd*, 566 F.3d at 345. The Fourth Circuit's published decisions have addressed only reliability as a factor in admitting hearsay in parole revocation hearings. *See United*

[3] *See also* Fed. R. Crim. P. 32.1(b)(2)(C) & Advisory Committee Note to 2002 Amendment ("[T]he court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it.").

*States v. McCallum*, 677 F.2d 1024, 1026 (4th Cir. 1982).

The Sixth Circuit has, in one case, analyzed hearsay statements only for reliability, without balancing the reasons for not producing the witnesses, though not based on hearsay exceptions. *United States v. Kirby*, 418 F.3d 621, 628 (6th Cir. 2005). In *Kirby*, there is no discussion of the district court's failure to balance reasons for not producing the witnesses, making it likely that the issue was not raised there. In an earlier case, *Waters*, 158 F.3d at 940, the Sixth Circuit expressly stated that the "trial court may consider reliable out-of-court statements in a final revocation hearing provided that the defendant's need for confrontation is outweighed by the government's ground for not requiring confrontation." Thus, when the issue is squarely discussed, the Sixth Circuit has endorsed balancing even if the evidence is deemed "reliable."

There is no practical distinction, however, between these minority rulings and the balancing test employed by the majority of circuits, including the Ninth Circuit. The Ninth Circuit's test works on a sliding scale—the more reliable the evidence, the less showing of good cause is necessary to excuse confrontation. At the extreme end of the reliability scale, the necessary showing of good cause is reduced to little or nothing.[4] In practice, the Ninth Circuit's

[4] "Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required." *Comito*, 177 F.3d at 1172. Since producing a witness always involves some inconvenience or

balancing test should almost always reach the same result as the test used by circuits that completely excuse any showing of good cause based on reliability of the out-of-court statement. *See United States v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005) (noting in *dicta* that "exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding").

The Tenth Circuit, discussing the variety of balancing tests used in the circuits, recognized this practical overlap among the tests. *Curtis*, 626 F.3d at 546. The Tenth Circuit, however, lost sight of the practicalities, when it wrote that "[o]nly the Ninth Circuit has expressly held highly reliable evidence (such as a hearsay exception) cannot be used in a revocation hearing unless it passes a balancing test." *Id.* The Ninth Circuit's complete test, as noted above, calibrates the balancing test according to reliability, so that the necessary showing of good cause vanishes to little or nothing if the evidence is reliable enough. *Comito*, 177 F.3d at 1172.

The Petition tries to bolster the impression of a circuit split by quoting out of context the portion of the Special Master recommendations that prohibits the State from adopting policies and procedures under the Stipulated Injunction that would double-count "reliability" on both sides of the balancing test. Pet. at 13-14. This was a remedial measure to deal with the

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expense, the practical effect is that in some cases, a statement will be deemed so reliable as to excuse any real showing of good cause for not producing the witness.

rampant confusion and inconsistency that the Special Master observed in the field, with hearing officers applying all sorts of distorted versions of a balancing test, including completely inverted tests. Pet. App. 35a-36a.

The Special Master reasonably and correctly saw the need for the State to formulate a clear and workable version of the test for hearing officers, including non-attorney hearing officers, to apply. This remedial measure in no way undermines the centrality of reliability of the evidence to the due process confrontation analysis. On the contrary, the Special Master specifically stated that the Injunction policies and procedures should incorporate the principle that "[i]f the proffered evidence would be admitted in civil or criminal proceedings under a hearsay exception, this increases its reliability and makes it more likely to be admitted because the parolee's interest is lessened." Pet. App. 69a. And, therefore, under the Ninth Circuit's *Comito* balancing test, the necessary showing of good cause for not producing the witness is also lessened. *Comito,* 177 F.3d at 1172.

The question may be asked, if the practical difference among the circuits' tests are so minor, why did the Plaintiff class pursue this issue at all? The answer is that the issues that the parties litigated below are not the issues presented in the Petition. The Plaintiff class sought to maintain the hearing officer's discretion to ensure fundamental fairness in the unpredictable and wide variety of circumstances that arise in parole revocation hearings. The State sought to hamstring the hearing officer with an inflexible rule that once a hearsay exception was identified, all analysis must stop, and no other factors may be

considered.[5] In these informal proceedings, however, the parolee receives no protection from federal or state rules of evidence. The only protection against imprisonment on innuendo or rumor is the hearing officer's flexible application of the confrontation right. The Plaintiff class resisted what the State sought below—which was the imposition of a one-size-fits-all rule, applying only hearsay exceptions but no hearsay exclusions, in a way that would prevent the hearing officer from looking at the totality of the facts before him, and ensuring that due process and fundamental fairness are respected.

The need for flexibility, unfettered by the determinative weight that the State would place on technical hearsay exceptions, is all the more important here, where the hearing officer corps contains no judges and many non-lawyers. Pet. App. 38a. It may be appropriate for the circuit courts to demand that district judges in federal supervised release proceedings put determinative weight on technical hearsay rules. It was reasonable, however, for the district court to maintain the non-judge hearing officer's flexibility to consider all factors regarding the admission of hearsay in revocation proceedings as part of the *Valdivia* remedy.

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[5] The State's counsel, however, represented at the hearing before the Special Master that the hearing officers would have the option of using a balancing test even where a hearsay exception applied. *Valdivia*, 548 F. Supp. 2d at 990-92. The Special Master reasonably concluded, however, that adding a reliability-only standard on top of the balancing test at this stage of the remedial process would "undermine[] the administrative ease and flexibility meant to attach to these less formal proceedings." Pet. App. 62a.

Flexibility is needed so that the hearing officer can consider circumstances such as whether the matter sought to be proved by the hearsay statement is really in dispute, or whether the hearsay statement is the only evidence that would send the parolee back to prison. In the informal revocation setting, these highly individualized circumstances have a bearing on whether any particular cross-examination is necessary. Such practical factors are more important in ensuring fundamental fairness of an informal hearing than are formalistic debates about precisely how the balancing test is expressed. The results of cases applying the balancing test demonstrate this flexibility, and do not show any tendency to hold the government to any rigid standard of good cause. *Compare United States v. Simmons,* 812 F.2d 561, 564-65 (9th Cir. 1987) (affirming revocation under balancing test where probationer had not challenged reliability of hearsay records, and they bore indicia of reliability), *and United States v. Walker,* 117 F.3d 417 (9th Cir. 1997) (same), *with United States v. Martin,* 984 F.2d 308 (9th Cir. 1993) (reversing revocation where denial of confrontation went to the only item of evidence supporting the charge and where releasee disputed the underlying facts, but still according government flexibility to provide substitutes for live witness).

This need for flexibility to account for unusual circumstances is recognized even by the circuit court decisions that the Petition characterizes as rejecting all balancing where hearsay exceptions apply. For example, in *Jones,* 299 F.3d at 113, the Second Circuit double-checked its confrontation holding by examining the validity of the government's stated reasons for not bringing the witnesses, holding that it would have

reached the same result even under a balancing test. *See also United States v. Aspinall*, 389 F.3d 332, 346 (2d Cir. 2004) (conducting balancing test under guise of harmless error analysis); *Curtis*, 626 F.3d at 547-48 "We would reach the same result if we applied a balancing test.").

"[I]nterpretation and application of the Due Process Clause are intensely practical matters[.]" *Goss v. Lopez*, 419 U.S. 565, 577 (1975). The Petition asserts a circuit split that is far-removed from the practical issues actually litigated below. This is a case where the differences among the circuits are largely a matter of the way that the balancing tests are expressed, not how they are carried out. This Court has stated that where differences among the circuits would not result in a "significant legal difference" there is no need to resolve the dispute. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997).

## III. THE NINTH CIRCUIT'S DECISION IS FAITHFUL TO *MORRISSEY* AND RAISES NO SPECTER OF PAROLEES RECEIVING MORE PROCESS THAN CRIMINAL DEFENDANTS.

The flexible hearing process envisioned by *Morrissey* allows for the admission of hearsay at parole revocation hearings. The Ninth Circuit and district court decisions below do not change that understanding. After *Valdivia*, parolees facing revocation will continue to have their cases heard informally, without the application of any formal rules of evidence, without a Sixth Amendment confrontation right, and without the right to exclusion of hearsay as a rule.

Every circuit to rule on the issue after *Crawford v. Washington*, 541 U.S. 36 (2004), has determined that the due process confrontation right recognized in *Morrissey* is separate from the Sixth Amendment confrontation right enjoyed by criminal defendants. *See* Pet. App. 8a-9a; *United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009); *United States v. Ray*, 530 F.3d 666, 668 (8th Cir. 2008); *United States v. Kelley*, 446 F.3d 688, 691-92 (7th Cir. 2006); *Ash v. Reilly*, 431 F.3d 826, 829-30 (D.C. Cir. 2005); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005); *United States v. Kirby*, 418 F.3d 621, 627-28 (6th Cir. 2005); *United States v. Aspinall*, 389 F.3d 332, 342-43 (2d Cir. 2004).

The Petition asks this Court to abandon the well-established distinction between the due process confrontation right and the Sixth Amendment confrontation right. It has presented no good reason for doing so in contravention of this Court's instruction that specific constitutional rights be analyzed according to the specific constitutional text at issue, and not by free-range construction from other parts of the Constitution. *See Graham v. Connor*, 490 U.S. 386, 393-95 (1989).

The Petition, as well as the dissent from the denial of *en banc* review, incorrectly asserts that requiring revocation hearing officers to apply a balancing test to all witness statements sought to be proved by hearsay will somehow elevate parolees' rights above those of criminal defendants. Even after *Crawford*, there is no such risk. Unlike criminal defendants, parolees are unprotected by the Sixth Amendment's absolute bar on testimonial hearsay, as well as by any formal rules of evidence barring non-testimonial hearsay. And they

remain unprotected by the other criminal trial guarantees. *Morrissey*, 408 U.S. at 480, 483, 489; *Gagnon*, 411 U.S. at 789; Pet. App. 12a, 13a.

Petitioners would selectively incorporate Sixth Amendment standards into parole revocation due process. This Court's extensive procedural due process jurisprudence does not direct that the way to determine what process is due is to start with constitutional criminal procedure, line up each procedural step, and then start subtracting until a satisfactorily low point is reached.[6] To the contrary, this Court has directed a practical and flexible analysis, carefully weighing the respective government and individual interests. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 528-29 (2004); *Mathews*, 424 U.S. at 334-35. Determining what process is due is not an exercise of wooden comparison between greater and lesser proceedings, but rather "is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey*, 408 U.S. at 481).

Here, the particular situation is that the parolee's liberty is decided in an informal hearing. No rules of evidence apply. There is no reasonable doubt standard. There is no right to jury trial. There is no right to a reporter's transcript. (In California, there is no court reporter, just a hearing officer with a pocket

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[6] *Morrissey* did not determine what minimal process is due by starting with the Sixth Amendment and working down. On the contrary, it examined the requirements of due process independent of constitutional criminal procedure rights. This Court "emphasize[d] that there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense." *Morrissey,* 408 U.S. at 489.

cassette recorder.) All hearsay, both testimonial and non-testimonial, is potentially admissible. Documents are read from files with no consideration of authentication or foundation.

The only protection against imprisonment on innuendo or rumor is that the parolee may cross-examine persons who have provided adverse statements, unless the hearing officer finds good cause for denying cross examination. The Ninth Circuit, and the majority of the other circuits, did not err in deciding that due process requires some consideration of the government's reasons for not producing the witness, along with consideration of the reliability of the witness's statements. The decision below, which allows admission of all hearsay—subject to balancing—does no injury to *Morrissey*'s flexible approach. Pet. App. 12a-13a.

The suggestion of the Petitioner, and of the dissent from the denial of *en banc* review, that all due process confrontation rights should now be modified in light of *Crawford* would cause enormous and unnecessary disruption across a wide area of the law. Not just in parole revocation, but also in various civil and administrative settings, "the Supreme Court has stressed the critical nature of the right to confront and cross-examine adverse witnesses." *McNeill v. Butz*, 480 F.2d 314, 321 (4th Cir. 1973) (discharge from public employment). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (termination of welfare benefits). The flexible confrontation right recognized in these administrative settings arises from independent due

process considerations, not from any attempt to transplant a watered-down version of the Sixth Amendment. *Morrissey* analyzed the parolee's flexible confrontation right with reference to administrative cases such as *Goldberg*. *Morrissey*, 408 U.S. at 481, 485. *Morrissey* then formed part of the basis for this Court's further clarification of the balancing necessary to determine what process is due in particular administrative settings. *See Mathews*, 424 U.S. at 334, 341. There is no reason for the Court to now reverse course and replace its well-considered due process analysis with a selective grafting of the Sixth Amendment's separate confrontation jurisprudence.

## IV. THERE IS NO JUSTICIABLE CONTROVERSY REGARDING FUTURE CRIMINAL DEFENDANTS' POTENTIAL RELIANCE ON DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO LIMIT NON-TESTIMONIAL OUT-OF-COURT STATEMENTS IN CRIMINAL TRIALS.

Article III of the Constitution limits the exercise of judicial power to "cases" and "controversies." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 239 (1937). A justiciable controversy is "distinguished from a difference or dispute of a hypothetical or abstract character . . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41. The Petition contends that this Court should grant *certiorari* because the opinion below "threatens to extend to defendants in criminal cases, confrontation rights under the due process clause of the Fourteenth Amendment." Pet. at 19. This case, however, does not present that issue.

This case is about California parolees' right to confrontation in parole revocation hearings under the *Valdivia* Stipulated Injunction. Whether or not criminal defendants will seek to use the decision below to invoke the protections set forth under *Morrissey* is not a "controversy" raised in the instant matter and is not a question the resolution of which would affect the parties to this dispute. This Court should not grant *certiorari* to provide an advisory opinion on an issue that is "an abstract dispute about the law, unlikely to affect these plaintiffs. . . ." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). *See also Conway v. Cal. Adult Auth.*, 396 U.S. 107, 110 (1969) (dismissing grant of certiorari where court reaching merits "would . . . in effect be rendering an advisory opinion"). "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Resolution here . . . can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

As noted above, due process confrontation rights separate from the Sixth Amendment have been part of this Court's jurisprudence for many decades. *See, e.g.*, *Morrissey*, 408 U.S. at 487, 489; *Goldberg*, 397 U.S. at 269; *see also Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). *Crawford's* re-examination of Sixth Amendment confrontation has been on the books for just under seven years. There is no evidence that the floodgates have opened for criminal defendants pressing due process confrontation rights under *Morrissey* or under the long-established balancing tests employed by the circuit courts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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January 31, 2011

# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

Appendix A: Stipulated Order for Permanent Injunctive Relief, United States District Court, Eastern District of California, (March 9, 2004)[CR-1034] ..... 1b

Appendix B: First Report of the Special Master on the Status of Conditions of the Remedial Order, In the United States District Court for the Eastern District of California, (excerpt) (Sept. 14, 2006)[CR-1302] .... 27b

Appendix C: Second Report of the Special Master on the Status of Conditions of the Remedial Order, In the United States District Court for the Eastern District of California, (excerpt) (June 11, 2007)[CR-1335] .... 29b

Appendix D: Order, United States District Court, Eastern District of California, (May 6, 2008)[CR-1439] ..... 31b

## APPENDIX A

[CR-1034]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-94-0671 LKK/GGH

[Filed March 9, 2004]

JERRY VALDIVIA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

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**STIPULATED ORDER FOR PERMANENT INJUNCTIVE RELIEF**

## I. INTRODUCTION

1. This action was filed on May 2, 1994. Plaintiffs, on behalf of themselves and the class they represent, challenged the constitutionality of parole revocation procedures conducted by the California Board of Prison Terms ("BPT") and the California Department of Corrections ("CDC").

2. The Court certified this case as a class action by order dated December 1, 1994. The Plaintiff class consists of the following persons: (1) California parolees who are at large; (2) California parolees in

custody as alleged parole violators, and who are awaiting revocation of their state parole; and (3) California parolees who are in custody, having been found in violation of parole and sentenced to prison custody.

3. The Defendants are state officials responsible for the policies and procedures by which California conducts parole revocation proceedings.

4. On June 13, 2002, this Court granted partial summary judgment in favor of Plaintiffs, holding that California's unitary parole revocation system violates the due process rights of the Plaintiff class under Morrissey v. Brewer, 408 U.S. 481 (1972), Gagnon v. Scarpelli, 411 U.S. 778 (1973), and related authority. The Court held that California's parole revocation system violated the due process clause of the Fourteenth Amendment by "allowing a delay of up to forty-five days or more before providing the parolee an opportunity to be heard regarding the reliability of the probable cause determination." Valdivia v. Davis, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002).

5. The parties stipulate that this is not a "civil case with respect to prison conditions," as those terms are defined and applied in the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, and that therefore this Order is not governed by the PLRA.

6. The parties hereby stipulate that the Court shall ADJUDGE, DECLARE, AND DECREE as follows:

## II. PARTIES

7. The Plaintiff class consists of the following persons: (1) California parolees who are at large; (2) California parolees in custody as alleged parole violators, and who are awaiting revocation of their state parole; and (3) California parolees who are in custody, having been found in violation of parole and sentenced to prison custody.

8. The Defendants are state officials responsible for the policies and procedures by which California conducts parole revocation proceedings. Defendant Arnold Schwarzenegger is Governor of the State of California and Chief Executive of the state government. Defendant Roderick Q. Hickman is the Secretary of the California Youth and Adult Correctional Agency. Defendant Edward S. Alameida, Jr., is Director of the California Department of Corrections. Defendant Richard Rimmer is Deputy Director of the California Department of Corrections, Parole and Community Services Division ("P&CSD"). Defendant Carol A. Daly is a Commissioner and Chair of the Board of Prison Terms ("BPT"). Defendants Alfred R. Angele, Sharon Lawin, Booker T. Welch, Jones M. Moore, and Kenneth L. Risen are Commissioners of the BPT. Defendant Kenneth E. Cater is Chief Deputy Commissioner of the BPT.

## III. DEFINITIONS

9. The following terms when used in this Order shall have the meanings specified below:

(a) "Parolee(s)" shall mean any member of the Plaintiff class.

(b) "Day(s)" shall mean calendar days, unless otherwise specified.

(c) "Revocation process" or "revocation proceedings" shall mean all stages of the process by which parole may be revoked, including placement of a parole hold, notice, waivers, service of Return to Custody Assessments, and hearings.

(d) "Return to Custody Assessments" ("RTCAs") shall mean the practice by which Defendants offer a parolee a specific disposition in return for a waiver of the parolee's right to a preliminary or final revocation hearing, or both.

(e) "Parole hold" shall mean any invocation by Defendants of their authority to involuntarily detain a parolee for revocation proceedings under Section 3056 of the California Penal Code. This term shall not apply to the detention of a parolee who has absconded from the State of California until he or she is physically returned to the State of California and is in its custody.

## IV. POLICIES, PROCEDURES, FORMS, AND PLANS

10. For all policies, procedures, forms, and plans developed under this Order, the parties shall use the following process: Defendants shall meet periodically with Plaintiffs' counsel to discuss their development of policies, procedures, forms, and plans. In preparation for such meetings, Defendants will provide Plaintiffs' counsel with copies of the proposed policies, procedures, forms, and plans in draft form no later than 7 days before the meeting. If the parties reach an

impasse on any particular issues, they may bring the disputed issues to the Court in a motion to be heard on shortened time.

11. Using the procedure set forth above in Paragraph 10, Defendants shall do the following:

(a) Defendants shall develop and implement sufficiently specific Policies and Procedures that will ensure continuous compliance with all of the requirements of this Order. The Policies and Procedures will provide for implementation of the August 21, 2003 Remedial Plan Outline (attached hereto as Exhibit A), as well as the requirements set forth below in Paragraphs 12-24. Defendants shall submit the completed Policies and Procedures to the Court no later than July 1, 2004.

(b) By July 1, 2004, Defendants shall begin implementing the following steps in the parole revocation process, which shall be completely implemented by January 1, 2005:

(i) Defendants shall appoint counsel for all parolees beginning at the RTCA stage of the revocation proceeding. Defendants shall provide an expedited probable cause hearing upon a sufficient offer of proof by appointed counsel that there is a complete defense to all parole violation charges that are the basis of the parole hold.

(ii) No later than 48 hours after the parol hold, or no later than the next business day if the hold is placed on a weekend or holiday, the parole agent and unit supervisor will confer to determine whether

probable cause exists to continue the parole hold, and will document their determination.

(iii) If the parole hold is continued thereafter, no later than 3 business days after the placement of the hold, the parolee will be served with actual notice of the alleged parole violation, including a short factual summary of the charged conduct and written notice of the parolee's rights regarding the revocation process and timeframes.

(iv) For all parolees who do not waive or seek a continuance of a final revocation hearing, Defendants shall provide a final revocation hearing on or before the 35th calendar day after the placement of the parole hold.

(c) By July 1, 2004, Defendants shall serve on counsel for Plaintiffs an assessment of the availability of facilities and a plan to provide hearing space for separate probable cause hearings.

(d) By July 1, 2005, in addition to the steps listed above, for all parolees who do waive or seek a continuance of a probable cause hearing, Defendants shall provide a hearing to determine probable cause no later than 10 business days after the parolee has been served with notice of the charges and rights (at the 3rd business day after the placement of the hold).

(e) Defendants shall complete implementation of the Policies and Procedures by July 1, 2005.

12. In addition to the provisions of the August 21, 2003 Remedial Plan Outline, the Policies and

Procedures shall ensure that the following requirements are met:

13. At the time of appointment, counsel appointed to represent parolees who have difficulty in communicating or participating in revocation proceedings, shall be informed of the nature of the difficulty, including but not limited to: mental illness, other cognitive or communication impairments, illiteracy, limited English-language proficiency, and the need for a foreign language interpreter. The appointment shall allow counsel adequate time to represent the parolee properly at each stage of the proceeding.

14. At the time of appointment, counsel shall be provided with all non-confidential reports and any other documents that the state intends to rely upon at the probable cause or final revocation hearing. After appointment, if the state learns of additional evidence or documents, and intends to rely on such additional evidence or documents, it shall produce them to counsel as soon as practicable before the hearing.

15. Defendants shall develop and implement policies and procedures for the designation of information as confidential that are consistent with the requirements of due process.

16. Non-confidential portions of parolees' field files shall be available to parolees' counsel unless good cause exists for failure to provide access to such files. Field file information shall be withheld from counsel as confidential only in accordance with the policies and procedures referenced in Paragraph 15.

17. Defendants shall develop standards, guidelines, and training for effective assistance of state appointed counsel in the parole revocation process.

18. Defendants will ensure that parolees receive effective communication throughout the entire revocation process.

19. Defendants will ensure that all BPT and CDC forms provided to parolees are reviewed for accuracy and are simplified to the extent possible through a procedure similar to that used to revise forms in Armstrong v. Davis, C94-2307 CW (N.D. Cal.). This process will include translation of forms to Spanish. Revised forms will be submitted to Plaintiffs' counsel for review prior to finalization, dissemination, or modification.

20. Upon written request, parolees shall be provided access to tapes of parole revocation hearings.

21. Parolees' counsel shall have the ability to subpoena and present witnesses and evidence to the same extent and under the same terms as the state.

22. At probable cause hearings, parolees shall be allowed to present evidence to defend or mitigate against the charges and proposed disposition. Such evidence shall be presented through documentary evidence or the charged parolee's testimony, either or both of which may include hearsay testimony.

23. Final revocation hearings shall occur within 35 calendar days of the parole hold.

24. The use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in United States v. Comito, 177 F.3d 1166 (9th Cir. 1999). The Policies and Procedures shall include guidelines and standards derived from such law.

## V. STAFFING LEVELS

Defendants shall maintain sufficient staffing levels in the CDC and BPT to meet all of the obligations of this Order.

## VI. MONITORING

25. The parties shall cooperate so that Plaintiffs' counsel has access to the information reasonably necessary to monitor Defendants' compliance with this Order and the Policies and Procedures adopted in response thereto. Such information shall include but not be limited to: access to documents, tours, observation of parole revocation proceedings, observation of training sessions, interviews of staff, and interviews with parolees. Plaintiffs' counsel may notice depositions under the Federal Rules of Civil Procedure either: (1) if Plaintiffs' counsel are unable to obtain relevant information through interviews and informal document requests, or (2) after notifying Defendants of non-compliance with this Order under Section VII, below. Before noticing a deposition, Plaintiffs' counsel must consult with opposing counsel about the deposition schedule so that the convenience of counsel, witnesses, and parties may be accommodated, if possible.

26. The parties shall meet regularly, and at least once every 90 days, to discuss implementation issues. At least once every 90 days, Defendants shall provide Plaintiffs' counsel with a report on hold-to-hearing time in substantially the same form, and with the same content as that currently used in Defendants' weekly "RSTS" meetings.

27. The parties shall agree on a mechanism for promptly addressing concerns raised by Plaintiffs' counsel regarding individual class members and emergencies.

## VII. ENFORCEMENT

28. The Court shall retain jurisdiction to enforce the terms of this Order. The Court shall have the power to enforce the terms of this Order through specific performance and all other remedies permitted by law or equity.

29. If Plaintiffs' counsel believe that Defendants are not complying with any of the acts required by this Order, the Remedial Plans, or Policies and Procedures produced pursuant to it, they shall notify Defendants in writing of the facts supporting their belief. Defendants shall investigate the allegations and respond in writing within 30 days. If Plaintiffs' counsel are not satisfied with Defendants' response, the parties shall conduct negotiations to resolve the issue(s). If the parties are unable to resolve the issue(s) satisfactorily, Plaintiffs may move the Court for any relief permitted by law or equity.

## VIII. ATTORNEY'S FEES AND COSTS

30. Plaintiffs are the prevailing party in this action. Plaintiffs' counsel may move for an award of reasonable attorney's fees and costs for obtaining relief for the Plaintiff class pursuant to 42 U.S.C. § 1988 or any other applicable law. Defendants shall pay Plaintiffs' counsel reasonable attorney's fees for work performed in connection with monitoring and enforcing this Order. The parties reserve the right to address at a future date whether 42 U.S.C. § 1997e(d) applies to an award of attorney's fees in this suit.

## IX. RESOLUTION OF CLAIMS

31. This stipulated order resolves all the claims in this case, except the following, to the extent that they are alleged in the Fifth Amended Complaint, if at all:

(a) Appeals. Plaintiffs assert that Defendants' administrative-appeals system for parole-revocation and revocation-extension decisions violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

(b) Revocation-Extension Proceedings. Plaintiffs assert that Defendants' policies, procedures, and practices for extending parole revocations based on alleged rules violations while in custody violate the Due Process Clause.

32. The parties anticipate that these issues will be resolved informally, without need for the Court's intervention. The parties will inform the Court if this does not occur.

**IT IS SO STIPULATED.**

Dated: November 12, 2003

ROSEN, BIEN & ASARO

By /s/ Michael W. Bien
MICHAEL BIEN

Dated: November 12, 2003 PRISON LAW OFFICE

By /s/ Donald Specter
DONALD SPECTER
Attorneys for Plaintiffs

Dated: November 17, 2003

BILL LOCKYER, Attorney General of the State of California, ROBERT R. ANDERSON, Chief Assistant Attorney General, FRANCES T. GRUNDER, Senior Assistant Attorney General, JONATHAN L. WOLFF, Supervising Deputy Attorney General

By /s/ Thomas S. Patterson
THOMAS S. PATTERSON
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Dated: November 17, 2003

By /s/ Roderick Q. Hickman
RODERICK Q. HICKMAN
Secretary, Youth and Adult Correctional Agency

Dated: November 17, 2003

By /s/ E. S. Alameida Jr.
EDWARD S. ALAMEIDA, Jr.
Director, California Department of Corrections

Dated: November 17, 2003

By /s/ Carol A. Daly
CAROL A. DALY
Chair, California Board of Prison Terms

## ORDER

The Court finds that this is not a "civil case with respect to prison conditions," as those terms are defined and applied in the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, and that therefore this Order is not governed by the PLRA. Defendants, their agents, employees, and successors in office are ordered to comply with all the terms stated above.

**IT IS SO ORDERED.**

Dated: 3/8, 2004

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge, Emeritus

[Exh A]

*BILL LOCKYER*
*Attorney General*

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*DEPARTMENT OF JUSTICE*

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August 20, 2003

The Honorable Lawrence K. Karlton
Chief Judge Emeritus
United States District Court, Eastern District
501 "I" Street
Sacramento, CA 95814

RE: Jerry Valdivia, et al. v. Gray Davis, et al.
USDC E.D. Cal., Case No. CIV-S-94-0671 LKK GGH P

Dear Judge Karlton:

The following is Defendants' revised remedial plan in this case. This plan represents a tremendous amount of work by the Defendants and other state officials since the July 23, 2003 order, much of which has been done recently while consulting Plaintiff's counsel.

Defendants continue to work with Plaintiffs' counsel to refine the revised remedial plan in efforts to perfect a viable revocation system that affords appropriate process.

With this in mind, neither Plaintiffs nor Defendants desire the Court to rule immediately on the adequacy of the revised remedial plan. Rather, they hope to resolve the issues soon and, of course, will advise the Court of the outcome of their efforts.

Sincerely,

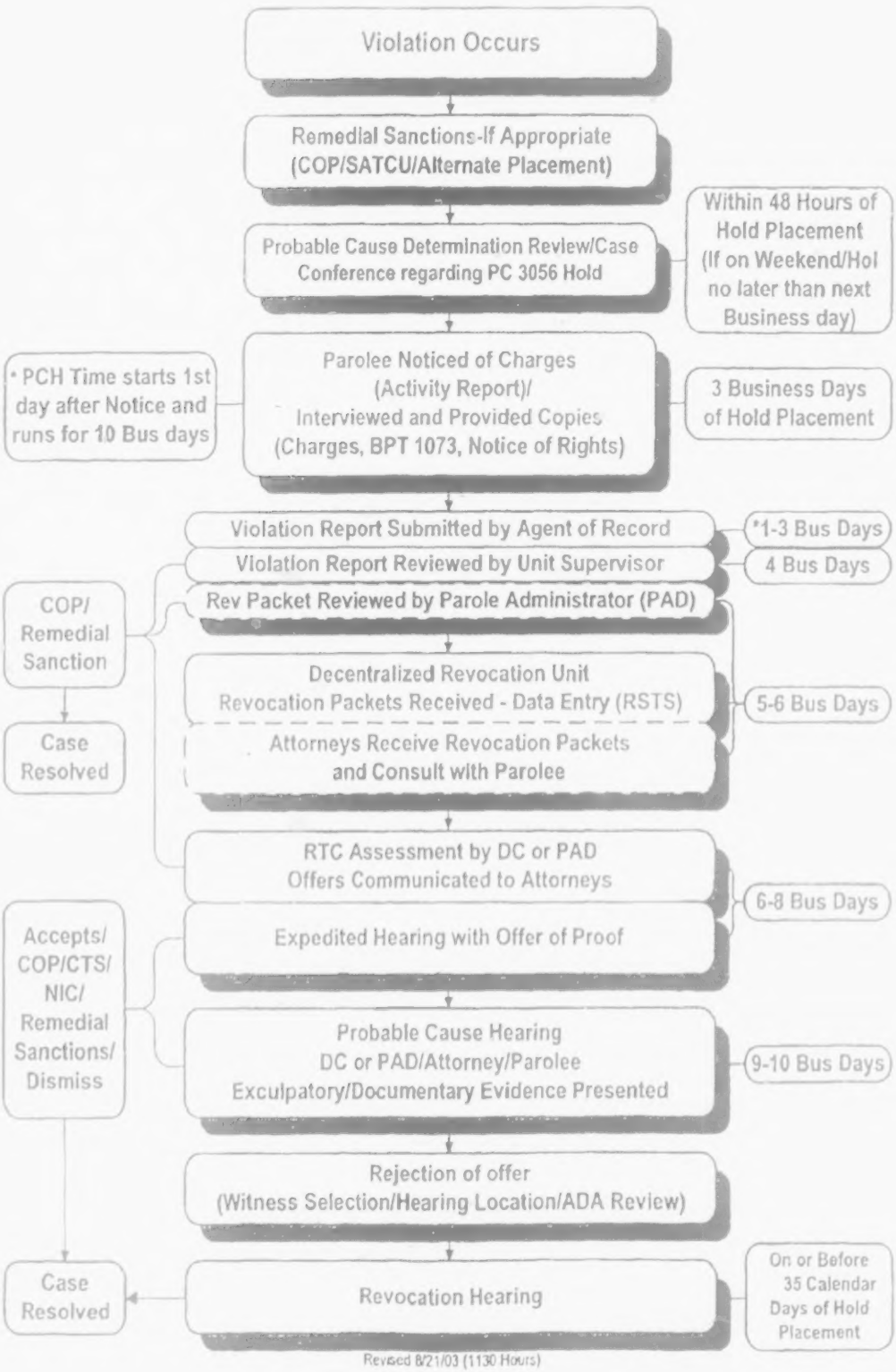
| | |
|---|---|
| /s/ Thomas S. Patterson | /s/ Donald Specter |
| THOMAS S. PATTERSON | DONALD SPECTER |
| Deputy Attorney General | Prison Law Office |
| Attorney for Defendants | Attorney for Plaintiffs |

For BILL LOCKYER
Attorney General

*[Fold out exhibit, see next page]*

**Valdivia Remedial Plan**
**Flowchart**

# Valdivia Remedial Plan


Violation Occurs
Remedial Sanctions-If Appropriate (COP/SATCU/Alternate Placement)
Probable Cause Determination Review/Case Conference regarding PC 3056 Hold
Within 48 Hours of Hold Placement (If on Weekend/Hol no later than next Business day)
* PCH Time starts 1st day after Notice and runs for 10 Bus days
Parolee Noticed of Charges (Activity Report)/ Interviewed and Provided Copies (Charges, BPT 1073, Notice of Rights)
3 Business Days of Hold Placement
Violation Report Submitted by Agent of Record
*1-3 Bus Days
Violation Report Reviewed by Unit Supervisor
4 Bus Days
Rev Packet Reviewed by Parole Administrator (PAD)
COP/ Remedial Sanction
Decentralized Revocation Unit Revocation Packets Received - Data Entry (RSTS)
5-6 Bus Days
Case Resolved
Attorneys Receive Revocation Packets and Consult with Parolee
RTC Assessment by DC or PAD Offers Communicated to Attorneys
6-8 Bus Days
Accepts/ COP/CTS/ NIC/ Remedial Sanctions/ Dismiss
Expedited Hearing with Offer of Proof
Probable Cause Hearing DC or PAD/Attorney/Parolee Exculpatory/Documentary Evidence Presented
9-10 Bus Days
Rejection of offer (Witness Selection/Hearing Location/ADA Review)
Case Resolved
Revocation Hearing
On or Before 35 Calendar Days of Hold Placement
Revised 8/21/03 (1130 Hours)

# VALDIVIA REMEDIAL PLAN POLICY OUTLINE

## VIOLATION OCCURS

There are a myriad of circumstances under which a Parolee can violate his or her conditions of parole. There are approximately 100,000 parole violations referred to the Board of Prison Terms each calendar year.

Currently about 60% of the reported violations are the result of arrests by local law enforcement. Of that 60% arrested by local law enforcement, many are charged in the local jurisdictions for crimes against the state, while others are not charged locally but instead referred to the Board of Prison Terms for administrative disposition.

The remaining 40% are arrests that involve the Parole officer, which may also result in local charges or referral to the Board of Prison Terms for administrative disposition.

The average parole violator's term in prison is five and one half months.

Approximately 66% of the cases referred to the Board of Prison Terms are resolved prior to the revocation hearing. Last year, the Board of Prison Terms conducted approximately 37,000 revocation hearings.

## REMEDIAL SANCTIONS

As part of the overall reform of the revocation process, the Parole and Community Services Division of the Department of Corrections will begin using remedial

sanctions/community based treatment placement in January of 2004.

Some of the remedial sanctions/community based treatment programs that will be used are the Substance Abuse Treatment Control Units, Electronic Monitoring, Self-Help Outpatient/aftercare programs, and alternative placement in structured and supervised environments.

These remedial sanctions are not considered violations of parole because participation in the remedial sanctions program is voluntary and participation in the remedial sanctions program will not make the parolee presumptively ineligible for discharge at 13 months.

The goal is to reduce the number of returns to prison for violations of parole by up to 10% in 2004 and by up to 30% by 2006.

**IF REMEDIAL SANCTIONS ARE DEEMED INAPPROPRIATE AND A PAROLE HOLD IS PLACED ON THE PAROLEE, A PROBABLE CAUSE DETERMINATION/REVIEW WILL TAKE PLACE WITHIN 48 HOURS OF THE HOLD AND IF THE HOLD IS PLACED ON A WEEKEND OR HOLIDAY, THE PROBABLE CAUSE REVIEW WILL BE CONDUCTED NO LATER THAN THE NEXT BUSINESS DAY FOLLOWING THE HOLD BEING PLACED.**

Although this probable cause review for parolees is not required under any of the current, relevant case law, it is being put in place in an attempt to take a second look at those individuals who have been placed into

custody to determine if the "present danger to public safety" concern still exists or if remedial sanctions/ community based treatment is possible at this juncture.

As an example, a parolee who was strung out on dope may have "dried out" sufficiently that he or she is no longer a danger to him or herself or the public and may be an appropriate candidate for community based treatment in a structured, supervised program.

Under such a scenario, the parolee would be released to a community based treatment program with the understanding that a specific condition of his or her release is the completion of the program and any other special conditions of parole that the Parole Agent deems appropriate.

Current regulation and case law require any special conditions of parole to have a nexus to the parolees' commitment offense or behavior.

**PAROLEE IS GIVEN ACTUAL WRITTEN NOTICE OF CHARGES WITH A SHORT FACTUAL SUMMARY OF THE BEHAVIOR; THE NOTICE OF RIGHTS REGARDING THE REVOCATION PROCESS; AND THE BPT 1073 ADA DETERMINATION IS MADE VIA A FACE TO FACE INTERVIEW WITHIN 3 BUSINESS DAYS OF THE HOLD BEING PLACED.**

If the remedial sanctions are deemed inappropriate, within three business days of the hold being placed, the parolee shall be served actual notice of the charges against him or her accompanied by a short factual summary of the behavior; he or she shall be

interviewed; an a ADA determination shall be made; the BPT form 1073 shall be completed, and parolee shall be provided with a written notice of rights regarding the revocation process and time frames. (Hereinafter referred to as "notice.")

The principles of "effective communication" apply to the revocation process. ADA accommodation must be provided for all parolees when necessary. In addition, all forms shall be printed in Spanish and English and a Spanish speaking person shall be available to interpret and explain the forms to the parolee where necessary.

**THE PROBABLE CAUSE HEARING SHALL BE CONDUCTED WITHIN 10 BUSINESS DAYS FOLLOWING THE DATE OF ACTUAL SERVICE OF THE NOTICE OF CHARGES, THE ADA DETERMINATION, AND THE NOTICE OF RIGHTS.**

Within the first 3 days after the parolee has been served with notice, the violation report must be completed and submitted to the Parole Unit supervisor.

On or before the fourth business day, the Unit Supervisor must review the report and: (1) determine if there is sufficient basis for the revocation to go forward; (2) determine if the report is accurate, complete, and contains the correct Title 15 violation sections; and (3) review the report and consider whether or not remedial sanctions/community based treatment is appropriate in lieu of proceeding with referral to the Board of Prison Terms with a

recommendation that the parolee be returned to prison.

On or before the 4th business day, the revocation packet is reviewed by the Parole Administrator to determine whether or not there is a sufficient basis for the case to move forward and whether or not Remedial Sanctions/Community Based Treatment is appropriate at this juncture.

On or before the 5th business day, the revocation packet is forwarded to the decentralized revocation unit where the parolee is being held.

On or before the 6th business day, the parolee (including non-Armstrong class members) shall be appointed an attorney and the attorney shall be provided with a copy of the revocation packet, which shall contain a signed copy of the notice of charges, notice of revocation of rights, and a completed BPT 1073.

Attorney shall meet with the Parolee, provide the parolee with a copy of the revocation packet, and shall communicate any offer or offers made by the Board of Prison Terms Deputy Commissioner/Parole Administrator prior to the probable cause hearing.

In the event the parolee can make a sufficient offer of proof of a complete defense to the charges the Board of Prison Terms Deputy Commissioner/Parole Administrator, an expedited Probable Cause Hearing with Documentary and/or live testimony shall be scheduled. As an example, if the parole has uncontroverted documentary evidence that he or she was in Santa Rita jail when this violation allegedly occurred

in Los Angeles, parolee shall be allowed to present such evidence at an expedited probable cause hearing between the 6th and 8th business day or at the earliest time possible thereafter if parolee is unable to produce such evidence by the 6th to 8th day.

On or before the 6th to 8th business day, a return to custody assessment (an offer) is made by the Deputy Commissioner/Parole Administrator, and the offer shall be communicated to the parolee's attorney.

On or before the 10th business day, a Probable Cause Hearing shall be held with the Deputy Commissioner/Parole Administrator, the parolee, and parolee's attorney.

The Deputy Commissioner/Parole Administrator conducting the hearing shall be the same Deputy Commissioner/Parole Administrator who made the return to custody assessment (offer) where practicable.

Parolee shall be permitted to present documentary evidence and hearsay testimony by way of offer of proof through his her attorney in mitigation or as a partial or complete defense to the charges and/or the proposed disposition.

The Deputy Commissioner/Parole Administrator shall have the complete range of options to resolve the case. (Continue on parole, credit for time served, release from custody with pending charges, remedial sanctions/community based treatment, reduce the offer downward, dismiss some or all of the charges)

The Deputy Commissioner shall not have the authority to adjust the return to custody assessment upward at or during the probable cause hearing.

Parolee shall have the right to waive time as to any of these hearing time constraints with or without good cause.

Attorney shall have the right to a continuance upon the showing of good cause in the absence of his or her client's consent in cases of emergency or illness or upon such other showing that the Deputy Commissioner/Parole Administrator can make a finding of good cause.

There shall be a written record of this proceeding and the basis for any decisions made therein.

It is not necessary that the Probable Cause Hearing be audio/video recorded.

If at the conclusion of the probable cause hearing, the parolee has rejected the offer, parolee shall provide the Deputy Commissioner/Parole Administrator with a list of witnesses he or she would like to call at the revocation hearing. The location of the hearing shall be determined (within 50 miles of the violation), and the Deputy Commissioner/Parole Administrator shall make an independent ADA accommodation determination.

**REVOCATION HEARING**

The revocation hearing shall be held at the earliest possible time and in no case later than 35 calendar days after the parole hold has been placed.

[*Certificates of Service omitted in printing this appendix*]

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## APPENDIX B

[CR-1302]
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA

No. CIV S-94-671 LKK/GGH

[Filed September 14, 2006]

| | |
|---|---|
| VALDIVIA, et al., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| vs. | ) |
| | ) |
| ARNOLD SCHWARZENEGGER, et al., | ) |
| | ) |
| Defendants. | ) |
| | ) |

**FIRST REPORT OF THE SPECIAL MASTER ON THE STATUS OF CONDITIONS OF THE REMEDIAL ORDER**

* * *

[p.34]

* * *

Interviews with CDCR parole agents and supervisors reveal that many uncertainties and

misinformation regarding hearsay information and *Comito* requirements remain. They also indicated that Deputy Commissioners' application of *Comito* varies depending upon their background and length of tenure, believing that less experienced Deputy Commissioners apply it too strictly, inappropriately limiting parole agents' speaking in hearings and excluding valid information. Parole agents and supervisors say they find the variation in how the standard is applied confusing and frustrating.

* * *

## APPENDIX C

[CR-1335]
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA

No. CIV S-94-671 LKK/GGH

[Filed June 11, 2007]

| | |
|---|---|
| VALDIVIA, et al., | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| vs. | ) |
| | ) |
| ARNOLD SCHWARZENEGGER, et al., | ) |
| | ) |
| Defendants. | ) |
| | ) |

**SECOND REPORT OF THE SPECIAL MASTER ON THE STATUS OF CONDITIONS OF THE REMEDIAL ORDER**

* * *

[p.25]

* * *

Application of standards from *Comito* and related cases appears to continue to be inconsistent across the

state. BPH and DAPO staff have received additional training during this period.

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## APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

**No. CIV S-94-671 LKK/GGH**

**[Filed May 6, 2008]**

JERRY VALDIVIA, ALFRED YANCY, and HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Governor of the State of California, et al.,

Defendants.

ORDER

On March 25, 2008, the court adopted the recommendations of the Special Master with regards to the enforcement of paragraph 24 of the permanent injunction that has been entered in the case. This provision of the injunction relates to the use of hearsay evidence in parole revocation proceedings. By adopting the Special Master's recommendations, the court

ordered the defendants to revise their policies and procedures so as to bring them in line with the consent decree.

In the instant motion, the defendants move the court to stay its order pending appeal. The court resolves the motion on the papers and after oral argument. For the reasons stated herein, the court denies defendants' motion.

## I. BACKGROUND[1]

This suit has been brought by a class comprising California parolees who challenged the parole revocation procedures utilized by defendants as violative of their due rights under the Fourteenth Amendment. After the court granted partial summary judgment for the plaintiffs, the parties stipulated to a permanent injunction, which was issued as an order of the court in March 2004. The injunction ordered the defendants to implement certain policies and procedures in order to remedy the on-going violations of the plaintiffs' due process rights. Among these, the injunction provided that "[t]he use of hearsay evidence shall be limited by the parolees' confrontation rights in the manner set forth under controlling law as currently stated in United States v. Comito, 177 F.3d 1166 (9th Cir. 1999). The [defendants'] Policies and Procedures shall include guidelines and standards derived from such law." Stipulated Order for Permanent Injunctive Relief ("Permanent Injunction"), Mar. 9, 2004, ¶ 24.

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[1] The court has described the facts of the case in detail in its June 13, 2002 and June 9, 2005 orders.

A Special Master was appointed in August 2005. The Special Master reported that there has been an ongoing disagreement between the parties as to whether the policies and procedures defendants adopted pursuant to paragraph 24 of the permanent injunction were adequate. Report and Recommendation Regarding Motion to Enforce Paragraph 24 of the Valdivia Permanent Injunction ("Special Master's Report"), February 24, 2008, at 1. Additionally, after a recent opinion was handed down by the Ninth Circuit addressing the use of hearsay evidence in revocation proceedings, the defendants expressed a desire to change their policies and procedures. Id. This caused further disagreement, which culminated in a motion by plaintiffs before the Special Master in late 2007. The Special Master heard the motion in December 2007 and issued his resultant report and recommendations in February 2008.

The Special Master's report and recommendations expressed several findings that are relevant to the instant motion. First, after a lengthy analysis, the Special Master concluded that defendants must employ the Comito balancing test when hearsay evidence is sought to be introduced against a parolee in revocation proceedings, even when that evidence falls under a recognized hearsay exception. Special Master's Report at 8-22. Second, the Special Master concluded that there was inadequate support for defendants' position that evidence that would otherwise be inadmissible could be utilized to corroborate hearsay evidence, when performing the Comito balancing test. Id. at 22-24. Finally, although the Special Master recommended the court not find a violation of the permanent injunction, the Special Master observed there were deficiencies in the

defendants' policies and procedures regarding the use of hearsay evidence that suggested that defendants' staff were not employing the proper legal standard when deciding whether to admit hearsay evidence against a parolee during revocation proceedings. Id. at 2-8. He recommended a set of changes to the policies and procedures to address this failure. Id. at 26-29.

After receiving objections from the parties, the court adopted the Special Master's recommendations in its March 25, 2008 order. The defendants now seek a stay of that order pending their appeal to the Ninth Circuit.

## II. STANDARD

A district court has discretion to stay its order, pending appeal, upon consideration of, "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The Ninth Circuit conceives this standard as "two interrelated legal tests" operating along a continuum. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). At one end of the continuum, the moving party may succeed if it shows that there is a probability of success on the merits as well as a possibility of irreparable injury. Golden Gate Restaurant Ass'n. v. City and County of San Francisco, 512 F.3d 1112, 1115-16 (9th Cir. 2008). At the other end, the moving party may succeed if it shows that it has raised "serious legal questions" and that "the balance of hardships tips sharply in its favor." Id. at

1116 (quoting Lopez, 713 F.2d at 1435). Finally, the district court must consider the public interest implicated by the grant of the stay; this consideration is distinct from the harm to the parties in the court's grant or denial of a stay. Natural Resource Defense Council, Inc. v. Winter, 502 F.3d 859, 863 64 (9th Cir. 2007).

## III. ANALYSIS

### A. Defendants' Likelihood of Success on the Merits

In order to succeed in its motion, the defendants must show at least the potential for success on the merits of its appeal. See Golden Gate, 512 F.3d at 1115-16; Lopez, 713 F.2d at 1435. In other words, if the defendants have no possibility of obtaining a favorable ruling in the appellate court, a stay is improper. Here, the defendants have met their burden to show that they present "serious legal questions" in their appeal.

#### 1. The Court's March 25, 2008 Order Is Appealable

The plaintiffs argue that the defendants have no possibility for success on appeal because the court's March 25, 2008 order is not appealable. By statute, the Court of Appeals only has jurisdiction over final decisions of the district court and over certain interlocutory decisions, including those "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. §§ 1291, 1292. Here, the defendants contend that appellate jurisdiction lies on

the basis that the court's order was a final decision of the district court. Notice of Appeal, April 7, 2008, at Attachment 3 (Ninth Circuit Civil Appeals Docketing Statement).[2] The court agrees that the Ninth Circuit could find this a proper characterization and thus assert jurisdiction.

In the most basic sense, a final decision is one that "ends the litigation . . . and leaves nothing for the court to execute the judgment." Catlin v. United States, 324 U.S. 229 (1945); see also Warehouse Restaurant, Inc. v. Customs House Restaurant, Inc., 726 F.2d 480, 480-81 (9th Cir. 1984). In cases where finality is not so straightforward, however, courts should be guided by practical considerations when deciding whether an order is final in the meaning of § 1291. Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949). In weighing practical considerations, the court should consider the expenditure of judicial resources that results from piecemeal review, versus the "danger of denying justice by delay." Gillespie, 379 U.S. at 152 (citation omitted).

A court's decision is not final where it is only a single step among many, which will culminate into one final judgment. Cohen, 337 U.S. at 546; see also Kimball v. Commandant Twelfth Naval Dist., 423 F.2d 88, 90 (9th Cir. 1970). In other words, a decision is not final where review would constitute an intervention or intrusion of the appellate court into a pending matter. Cohen, 337 U.S. at 546. Appellate courts may assert

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[2] Moreover, the defendants did not follow the requirements of 28 U.S.C. § 1292(b) for seeking an interlocutory appeal.

jurisdiction where that concern is absent and where review at the moment it is sought serves the ends of justice. Id.; Gillespie, 379 U.S. at 153; Branson v. City of Los Angeles, 912 F.2d 334, 336 (9th Cir. 1990); Peabody Coal Co. v. Local Unions 1734, 1508 & 1548, 484 F.2d 78, 84-85 (6th Cir. 1973).

The circumstances of the instant case suggest that it is apt to characterize the March 25 order as final, for the purpose of enabling appellate review. As described above, summary judgment was entered for the plaintiffs in 2002 and a permanent injunction issued in 2004. Since then, the court has merely acted in order to enforce that injunction. Its March 25 order was another instance of this: the court declined to find that the defendants had violated the terms of the injunction, declined to modify the injunction to alter the standard by which hearsay was to be admitted in revocation proceedings, and gave guidance to the defendants as to what effective policies and procedures should guide the use of hearsay evidence. At this stage in the case, the court is not progressing to a single final judgment, see Cohen, 337 U.S. at 546, and appellate review would not be an undue interference.

Moreover, the interests of justice weigh in favor of review, in the sense that the defendants would have no other remedy if the court has erred in its March 25 order. Because the court is acting primarily as an enforcer of the permanent injunction, there is no innate endpoint to the court's retention of the case. Consequently, to require the defendants to wait to bring their appeal until some unknown moment in the future would exemplify "denying justice by delay," if the March 25 order does in fact merit reversal. See Gillespie, 379 U.S. at 152.

The plaintiffs encourage the court to hold that the March 25 order is not final because the court has retained jurisdiction to set deadlines for the order's enforcement. A decision, however, may be "final" under § 1291 even if it is not necessarily the last order in the case. Gillespie, 379 U.S. at 152. For instance, the Ninth Circuit has held that a denial of a temporary restraining order was a "final decision," as it implied that the district court would also deny a permanent injunction, although the case had not yet progressed to that point. Kimball, 423 F.2d at 90. Similarly, although the court may later set firm deadlines for the execution of the March 25 order, the conclusions of law and fact contained therein are firm.

Accordingly, the court cannot conclude that the defendants have no possibility of success in their appeal on the basis of jurisdiction.

### 2. The Merits of the Defendants' Arguments on the Legal Questions Presented for Appeal

The defendants represent to the court that they are appealing three aspects of the March 25 order: (1) that the Comito balancing test must be employed even when the evidence sought to be introduced falls under a hearsay exception; (2) that hearsay cannot be corroborated with other hearsay, when considering the reliability of the evidence under the Comito test; and (3) that the order exceeds the scope of the injunction and controlling authority. The court concludes that the defendants have shown only that they present a "serious legal question" as to the first and second of these grounds.

### a. Comito Balancing Where the Evidence Falls Under a Recognized Hearsay Exception

While not desiring simply to restate the analysis contained in the Special Master's report, incorporated in the March 25 order, it is apparent to the court that the defendants have not shown a probability of success on the merits of this issue, but have shown that they will present the Court of Appeals with a legal question meriting review.

As described above, the Permanent Injunction provides that the use of hearsay evidence in revocation proceedings is governed by United States v. Comito, 177 F.3d 1166 (9th Cir. 1999). Preliminarily, the text of the Injunction appears to state that Comito controls the issue of the introduction of hearsay evidence and consequently if the law of the Circuit changes, an amendment of the Injunction would be required. Because the Injunction was the result of the joint work and stipulation of both parties, it seems that defendants agreed to be bound by Comito. The court is therefore inclined to believe that defendants' argument that subsequent cases have undermined Comito are misplaced.

Nevertheless, it is possible that the Circuit court will disagree, holding that it would be improper to bind the defendants to Comito's requirements if Comito no longer remains good law. The court therefore turns to the merits of defendants' argument.

Despite defendants' assertion to the contrary, it does not appear that Comito has been abrogated by subsequent decisions. Comito held that hearsay

evidence may only be used against a releasee at a revocation hearing after the court or decisionmaker weighs the releasee's interest in his confrontation right against the government's good cause for not producing the witness. Comito, 177 F.3d at 1170. The releasee's interest in confrontation is primarily gauged by the importance of the evidence to the court's ultimate decision and the accuracy and reliability of the evidence. Id. at 1171 (citing United States v. Martin, 984 F.2d 308, 309-10 (9th Cir. 1993)).

In Comito, the hearsay testimony at issue was alleged statements by the victim made to a police officer. Id. The court held that the unreliability of this type of hearsay evidence served to strengthen Comito's interest in confronting the victim. Id. The court contrasted this hearsay evidence to other types that were more reliable, such as the regular report of a business or an official record of a probation officer. Id. (citing Martin, 984 F.2d at 314 and United States v. Walker, 117 F.3d 417, 421 (9th Cir. 1997)). In so doing, the court implied that hearsay that falls under a traditional exception to the hearsay rule may be deemed more reliable when conducting the balancing test; it did not suggest that such types of hearsay could bypass the balancing test entirely.

Subsequently, in United States v. Hall, 419 F.3d 980 (9th Cir. 2005), the Ninth Circuit confronted, albeit obliquely, the issue of the admission of hearsay evidence in a revocation hearing. There, the releasee challenged evidence of a domestic violence charge that was one of the bases for revocation of his supervised release. Hall, 419 F.3d at 983-84. The court employed the Comito balancing test, concluding that Hall's interest in confronting the adverse witness (the alleged

victim of the domestic violence) was low, since there was sufficient non-hearsay evidence to convict him of the domestic violence charge. Id. at 986-87. The court then observed that several pieces of evidence supporting the domestic violence charge were admissible under hearsay exceptions, including medical records and the business records of the parole officer, and that these types of evidence "should satisfy the lesser standard of due process" afforded to releasees in revocation proceedings. Id. at 987. It then concluded, "Hall's interest in excluding hearsay evidence relevant to the domestic violence allegation was thus weak . . . ." Id.

As the Special Master explained, Hall's analysis does not seem to suggest that the Comito test is unnecessary when evidence falling under a hearsay exception is at issue. On the contrary, by employing the Comito test, the Hall court seemed to signal that this remained the standard for analyzing the admissibility of hearsay evidence in revocation proceedings. Moreover, as detailed in the Special Master's report, this approach comports with prior cases in the Circuit as well as the law governing the due process rights of parolees in revocation proceedings generally. Consequently, the court cannot agree with defendants that there is a probability or even a strong likelihood that they will succeed on the merits of this claim on appeal.

Nevertheless, because the Ninth Circuit has never addressed the issue squarely, it is fair to conclude that the defendants raise a "serious legal question" for review. Consideration of the remaining prongs of the Hilton test is therefore warranted and occurs below.

### b. Whether Hearsay Can Be Corroborated With Other Hearsay, For the Purpose of Determining Its Reliability Under Comito

The defendants also assert that Comito permits hearsay evidence to be corroborated with other hearsay in order to show the former's reliability, within the context of the balancing test. Just as the court concluded in adopting the Special Master's finding in the March 25 order, there seems little support for this approach under the Circuit's precedent.

In Hall, the court considered whether hearsay evidence should have been admitted to substantiate the releasee's charge of false imprisonment. Hall, 419 F.3d at 987-88. The court concluded that this evidence bore "some indicia of reliability," noting both hearsay and non-hearsay evidence that corroborated it. Id. It is therefore unclear what corroborative weight, if any, the court gave the hearsay evidence.

The court, like the Special Master, is aware of no other binding authority that could support defendants' position. There certainly is nothing that suggests to the court that defendants have any likelihood of success in their appeal of this issue. Since, however, the Court of Appeals has not held on this issue and it presents a question that a court is likely to confront again, see Gilder v. PGA Tour, Inc., 936 F.2d 471 (9th Cir. 1991), it is again fair to conclude that this is a serious legal question for review.

### c. Whether the Court's Order For the Revision of the Defendants' Policies and Procedures

Finally, the defendants contend that the revisions to their policies and procedures that the court ordered on March 25 fall outside of the scope of the permanent injunction and the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972). The defendants have not shown any likelihood of success on appeal on this claim, nor does it pose a legal question sufficiently serious to merit appellate review.

The Permanent Injunction required the defendants to create policies and procedures to guarantee the due process rights of the plaintiffs in revocations procedures, which were to include "guidelines and standards derived from" Comito. Permanent Injunction ¶ 24. While the defendants seemed to comply with the letter of this requirement, by creating and promulgating policies and procedures in apparent good faith, they did not comply with its spirit. Consequently, the court agreed with the Special Master's recommendations that while it was not appropriate to hold that the defendants violated the Permanent Injunction, the policies and procedures remained so deficient as to warrant additional court direction as to what minimum elements the policies and procedures must contain so as to adequately serve their function of guaranteeing due process rights of the plaintiffs under Morrissey and Gagnon v. Scarpelli, 411 U.S. 778 (1973).

This determination was based on several factual findings of the Special Master. These include that defendants' written materials repeatedly misstated

what the Comito balancing rule is, which is a plain indication that Deputy Commissioners would erroneously apply the balancing test. Special Master's Report at 2-3. Training on hearsay issues is minimal and "confusing," which is of particular concern since a minority of the Deputy Commissioners are lawyers. Id. at 4-5. These concerns manifest in observed instances where the Deputy Commissioners have misapplied the law governing the admission of hearsay. Id. at 5-8. Finally, it is difficult to ascertain the true scope of the problem, there has been no systematic review of the Deputy Commissioner's application of hearsay law in revocation proceedings. Id. at 7-8.

These findings suffice to show that there is significant danger that the due process protections to which the plaintiffs are entitled are not being respected by the defendants, as evidenced by the systemic deficiencies in training and the accuracy of written materials. Indeed, this danger is a reality, as the specific instances of misapplication of hearsay law in revocation proceedings demonstrate. The changes ordered by the court on March 25 reflect its attempt to bring the defendants' policies and procedures in line with the terms of the Permanent Injunction, which seeks, inter alia, to prevent on-going due process violations as defined by Morrissey and Gagnon. In other words, the March 25 order does not create "new" requirements, as the defendants claim, but rather makes explicit what the policies and procedures should have contained upon their inception several years ago.

The court cannot agree that there is any likelihood that the defendants will succeed on the merits of this claim on appeal or even that it presents a serious

question of law that the appellate court would find worthy of review.

**B. The Balance of Hardships**

Because the defendants only show that there are "serious legal questions" arising from the court's March 25 order, in order for the stay to be warranted, the defendants must show that the balance of hardships tips "sharply" in their favor. They have not made this showing.

The primary hardships asserted be defendants are the financial costs and administrative burden of implementing the measures required by the March 25 order, if that order is reversed. These costs include those associated with the development of a system to track data, training the Deputy Commissioners to perform Constitutionally adequate revocation hearings, and participation in the meet-and-confer process. Additionally, the defendants contend that the process by which it would contract with outside providers is time-consuming. Finally, defendants state that the March 25 order would insert the plaintiffs and Special Master into personnel matters of the State, harming both state employees and potentially exposing the State to litigation.

As a preliminary matter, several of these claimed hardships carry no weight in the court's balancing process. The meet-and-confer process, while required by the March 25 order, was already required by the Permanent Injunction. See Stipulated Order for Permanent Injunctive Relief ¶ 10 (requiring the defendants to "meet periodically with Plaintiffs' counsel to discuss their development" of all policies

and procedures developed in accordance with the injunction). Therefore, even if the court had not issued its guidelines for the policies and procedures relevant to Paragraph 24 of the Permanent Injunction, the parties would nevertheless be required to meet and confer until they reached an agreement or an impasse requiring court resolution. See id. The March 25 order has added no extra burden on the defendants in this regard.

The court also places no weight on the defendants' parade of horribles regarding the improper insertion of the plaintiffs and Special Master into State personnel matters. The March 25 order does no such thing. The order, through its adoption of the Special Master's recommendations, requires defendants to create a plan that adequately ensures that the Deputy Commissioners are in fact carrying out revocation hearings that meet "minimum standards" as defined by the defendants. Special Master's Report at 28. It does not confer on plaintiffs or the Special Master the right to inspect personnel files or to monitor staff evaluations or discipline proceedings. Nor, as the defendants suggest, would it compell the termination of a Deputy Commissioner who fails to meet these minimum standards. Instead, the order plainly gives the defendants discretion to create a plan that ensures that revocation hearings pass Constitutional muster, so long as the plaintiffs and Special Master have input in the plan itself and so long as the plan "proceeds under the guidance of the Special Master." See id. at 28-29. Defendants' allegations beyond this appear to be no more than hyperbolic hand-wringing.

What remains, then, are the financial costs and administrative burden of implementing policy reforms

that may later be deemed unnecessary by the Circuit court. On the other side of the equation, if a stay is granted, the injury to the plaintiffs includes the possibility of unlawful revocation of parole based on the improper admission of hearsay evidence. Balancing these competing hardships, those of the plaintiffs are plainly more weighty. Where human welfare and the potential for suffering are concerned, the state's expenditures of money, time, and administrative resources are rarely so overwhelming so as to permit a court to conclude that balance of hardships sharply favors the latter. See, e.g., Lopez, 713 F.2d at 1437; Golden Gate, 512 F.3d at 1126; see also Long v. Robinson, 432 F.2d 977, 980-81 (4th Cir. 1970). Not only are plaintiffs' potential physical and emotional suffering resulting from wrongful incarceration some of the most burdensome "hardships" cognizable, but this suffering could not truly be remedied retroactively. See Lopez, 713 F.2d at 1437 (wrongful loss of disability benefits could not be remedied by retroactive restoration). A wrongful incarceration undoubtedly strains an individual's personal relationships and career stability, as well as causes personal distress. It is difficult to imagine how this damage could be repaired retroactively, even if a plaintiff succeeds in writ of habeas corpus later. Put plainly, "faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." Id.

**C. The Public Interest**

Finally, the court considers whether the public interest lies in granting the stay or denying it. Hilton, 481 U.S. at 776. While defendants are correct in

asserting that the strain to public finances and administrative resources figures into this calculus, it is not dispositive. The court must also consider the harm to the plaintiffs' friends and family members, as well as the myriad interests of society as a whole. Lopez, 713 F.2d at 1437; Golden Gate, 512 F.3d 1126.

The public certainly has an interest in seeing that public resources are not expended needlessly. However, "the government must be concerned not just with the public fisc, but also with the public weal." Lopez, 713 F.2d at 1437. The public has an interest in ensuring that revocation proceedings are fair, because the public has a general interest in the guarantee of the due process rights enshrined in the Constitution. See id. In addition, those who rely on the individual plaintiffs in the context of various relationships -- whether it be family, friend, or even employer or employee -- have an interest in ensuring that that plaintiff is not wrongfully incarcerated through the misuse of hearsay evidence. Although the court is mindful of the countervailing interest in prudent spending of state financial and administrative resources, the public interest firmly favors the plaintiffs in this instance.

In sum, although the defendants present a serious legal question that may merit appellate review, the balance of hardships and public interest weigh in favor of denial of the stay.

## IV. CONCLUSION

Accordingly, the defendants' motion for a stay of the court's March 25, 2008 order is DENIED.

IT IS SO ORDERED.

DATED: May 5, 2008.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT